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No. ~~97-797~~

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

CASE CORPORATION,

Petitioner,

v.

DANIEL FREEMAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE[1]

I. Procedural Background.

Daniel Freeman appealed the district court's judgment as a matter of law which overturned a jury's verdict in his favor. The district court ruled in favor of Case Corporation on issues related to liability and certain affirmative defenses. The district court, however, reaffirmed its earlier ruling that the analytical framework set out by this Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 578 (1993), did not apply "to a nonscientific context such as the examination of a tractor by a mechanical engineer. . . . " Pet.'s App. 31a. Although it received an adverse ruling on the *Daubert* issue, Case did not cross-appeal this ruling to the United States Court of Appeals for the Fourth Circuit. Consequently, the Fourth Circuit made only a passing reference to *Daubert* in a footnote explaining that it was not addressing the issue.

II. Factual Background.

On May 22, 1992, Daniel Freeman was severely injured when his Case 1130 tractor ("1130") unexpectedly lunged forward and rolled over an embankment. C.A. App. 227. Freeman had purchased his 1130 in the fall of

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[1] The "Statement of the Case" in the petition fails to present material facts, misstates certain facts in the record, and mischaracterizes other facts and events which occurred at trial. Specifically, Case paints a false picture of a runaway jury enflamed by the testimony of an unqualified expert. To understand the nature of the expert testimony and the inaccuracy in Case's description, it is necessary to understand the product and the background of the expert's testimony.

1991, but had stored it during the winter. C.A. App. 222-225. For the 17 years preceding his purchase of the 1130, Freeman had been mowing his lawn with a John Deere tractor without incident. When he was injured, Freeman was mowing his lawn for only the second time with his 1130 and was almost finished mowing when the mower blade glanced a rock. C.A. App. 1466, 1467.

In an attempt to falsely portray Freeman's actions as unreasonable, Case suggests that Freeman ran his 1130 into a "boulder." Pet.'s Br. at 2. As demonstrated by the record, such a characterization is misleading. The rock in question protruded only a few inches above the ground and was barely visible. C.A. App. 245, 246. At trial, the evidence was clear that the mower blade was the only part that contacted the rock. The rock which the mower struck was approximately 6 to 8 feet from the edge of an embankment. C.A. App. 265. After glancing the rock, Mr. Freeman pressed the clutch with his left foot, pressed the brake with his right foot, and raised the mower deck to clear the rock and to check for any damage to the blade. C.A. App. 227. Freeman intended to back the 1130 away from the embankment using the reverse position of the speed ratio control ("SRC"). C.A. App. 245.

However, when Freeman released the clutch with his left foot and with his right foot still on the brake, the 1130 lunged forward in the direction of the embankment. C.A. App. 227, 229. Because of the sudden lunge and speed of the 1130, Freeman could not stop the 1130 before it went over the embankment. This was not a "roll-over" accident as Case claims in its statement. Rather, Freeman intentionally jumped to the right of the 1130 in an attempt to clear himself of the out-of-control tractor. C.A. App. 359.

Freeman then rolled down the embankment approximately 40 feet from the place where he leapt from the 1130. C.A. App. 228. When Freeman stopped at the bottom of the embankment, the 1130, with the blades under full power, landed on top of him with the blades striking Freeman numerous times, causing large degloving slashes. C.A. App. 248.

Freeman's 1130 is equipped with a hydrostatic drive transmission. C.A. App. 221. With the hydrostatic drive transmission, the ground speed is controlled with a foot pedal located on the right side of the 1130 and known as the speed ratio control ("SRC"). C.A. App. 1793. The forward and reverse pedals are located on opposite ends of a rocker arm located on the operator's right side. C.A. App. 1793. The brake pedals are also located on the right side directly above the forward SRC. C.A. App. 1793.

The engine speed of the 1130 is set with a hand control. C.A. App. 1790. Once set, the engine speed requires no further input by the driver. To move the 1130 forward, the operator presses the forward SRC with his right foot. Slight pressure on the SRC will cause the 1130 to creep forward. More pressure on the SRC increases the ground speed of the tractor. C.A. App. 1793. If the pedal is pressed to its full extent, then the 1130 would be at a maximum ground speed at that given engine speed. If the operator removes his foot from the SRC, the SRC automatically returns to the neutral or park position and the tractor will stop without application of the brake. C.A. App. 1346, 1793. In effect, the automatic return to the park position functions as a brake for the 1130. If the clutch and the SRC are engaged, the 1130 remains still and the engine speed does not change. C.A. App. 1351.

Likewise, if the clutch is released and the SRC is not engaged, the 1130 will not move.

The mower on Freeman's 1130 was a "mid-mounted" mower which is also called a "belly" mower. C.A. App. 222. The power to the mower is supplied by the "mid-power takeoff" ("PTO") on the 1130. C.A. App. 1773, 1823. With the hydrostatic drive transmission, the clutch pedal has two positions. When the clutch pedal is released, both the transmission and PTO are engaged. C.A. App. 1795. When the clutch pedal is depressed, both the transmission and PTO are disengaged. C.A. App. 1795.

Before he was injured, Freeman had never used the brake on his 1130. C.A. App. 226. To stop the 1130, he simply released the SRC which was all that was required to stop the 1130. C.A. App. 226.

III. The Expert Testimony.

Freeman offered the testimony of Smith Reed, a mechanical engineer. C.A. App. 643. Reed had extensive experience as a practicing engineer. C.A. App. 646, 647. Particularly germane to this case was Reed's experience in the design and manufacture of lawn and garden tractors and mowing machines similar to the Case 1130. C.A. App. 647, 648. Part of Reed's responsibilities while employed by a manufacturer of lawn and garden tractors was to investigate accidents which involved products which were designed or manufactured under his direction. C.A. App. 651.

Reed opined that Freeman's 1130 was defective because of its pedal design which could cause the 1130 to lunge out of control and its lack of an OPC. In formulating his opinions, Reed reviewed the literature describing the design of approximately 20 other tractors of various sizes from manufacturers other than Case, the design documents for the 1130, and numerous publications dealing with safety concerns regarding mowing machines.[2] After learning the facts leading up to Freeman's injury, Reed personally tested Freeman's 1130 to determine the cause of the accident. From his testing, Reed determined that Freeman had inadvertently engaged the SRC pedal while pressing the brake. Reed's testing also revealed that the brakes were not capable of overriding the forward lunging motion of the tractor. C.A. App. 669.

At trial, Case defended its product with the testimony of Bernard Ross.[3] After Case attempted to establish Ross' qualifications as an expert, Freeman's counsel conducted a voir dire of Ross which exposed many glaring deficiencies in Ross' qualifications. While Ross held an

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[2] While Reed had conducted an extensive review of industry practices, the district court sustained Case's objection to the admission of this evidence on the grounds that it was not relevant. In its post-trial opinion, the district court admitted that it may have committed error on this point.

[3] Case also hired Richard Schmidt to testify as a "human factors expert." Schmidt did drive an 1130. However, the 1130 driven by Schmidt was substantially different than Freeman's. For example, the 1130 driven by Schmidt did not even have a mower attachment and was equipped with a "scoop." C.A. App. 1363, 1364, 1385. Schmidt could not quantify the difference between the weight distribution between the 1130 he tested and Freeman's 1130.

undergraduate degree in mechanical engineering, his post graduate work was in the field of aeronautical and aerospace engineering. C.A. App. 770. Ross stated that he never conducted any research activities which involved mowers, riding lawn mowers, or garden tractors. C.A. App. 770. Ross had never been employed by a company that designed, produced, or manufactured mowers or tractors. C.A. App. 770. As a testifying engineer for over 30 years, Ross claimed expertise with 800 different products ranging from sliding glass doors to banana gantries, but this was his first opportunity to testify in a case involving a mower. C.A. App. 773. The last time Ross had any practical experience with the operation of tractors was in 1956 while working for a circus. C.A. App. 776. Ross lost his engineering license in 1991 over what he claims was a dispute over dues. C.A. App. 782. Ross testified that he is now willing to pay his dues but to regain his license he must pass an engineering exam which he refuses to take. C.A. App. 782. While Ross claimed that he had probably testified in cases involving tractors at some point during his 30 year career as an expert witness, there was no such indication on his resume nor could he recall the specifics of these cases. C.A. App. 787, 788. Ross was certain that he had not testified in a case involving a tractor within the last 5 years. C.A. App. 788. At the conclusion of the voir dire, Freeman sought to exclude the testimony of Ross because he lacked sufficient qualifications regarding this particular product. The district court overruled Freeman's motion to exclude Ross' testimony and allowed Ross to testify. C.A. App. 788, 789.

Rather than testing Freeman's 1130, Case chose to present tests involving a Kubota 2150 tractor through the testimony of Ross. These tests were borrowed from another products liability action involving a runaway Kubota tractor. C.A. App. 863. Ross was not involved in the case or the tests but merely talked with the engineer that was hired to defend Kubota. C.A. App. 863. The tests involved asking the operators to apply the brake upon a visual cue. C.A. App. 843. Ross gave no indication that the operators in these tests used the clutch which would mask inadvertent actuation of the SRC pedal similar to what happened to Freeman. C.A. App. 843. In this respect, the Kubota tests had little relevance to the circumstances leading up to Freeman's injury. Although Ross failed to conduct any tests on the 1130, he still billed Case $30,000 for his report outlining his opinions. C.A. App. 906.

At trial, the utility of having the SRC in proximity to the brake pedals was contested. According to L. D. Baker, Case's Safety Engineer who worked on the 1130, there is no reason for an operator to simultaneously engage the brake pedal and SRC with his right foot. C.A. App. 579. Even when differential steering is required or desired, simultaneous engagement of the SRC and the brake with the right foot is not necessary. According to Baker, differential steering is accomplished by locking the SRC in position, thereby freeing the operator's right foot to operate either the right or left brake. C.A. App. 579. Smith Reed, Freeman's expert witness, testified that there was no useful purpose in having the brake in close proximity to the SRC. C.A. App. 682.

Contrary to what plaintiff contends happened and what Reed's tests confirmed, Case's expert Ross testified that the brake "can defeat the motor in the mid-range, and eventually cause the engine to stall out." In fact, Ross added that this braking feature was the "fail safe aspect of this machine." C.A. App. 833. Ross formulated this conclusion without ever operating an 1130 unit. When Ross was given the opportunity at trial to verify his opinions to the jury utilizing Freeman's 1130, Case's counsel vigorously objected because Ross was not "skilled" in the operation of the 1130. C.A. App. 868.

An Operator Presence Control ("OPC") is a device used since the early 1970s that stops the mower blades if an operator leaves the seat. C.A. App. 680. OPC devices are designed to reduce or eliminate blade contact injuries and have been used since the early 1970's. C.A. App. 680. According to Reed, two standards were applicable to the 1130 which required the use of an OPC: ANSI/OPEI[4] B71.1, "American National Standard for Consumer Turf Care Equipment – Walk-Behind Mowers and Ride-On Machines with Mowers – Safety Specifications," and ANSI B71.4, "American National Standard for Commercial Turf Care Equipment – Safety Specifications." C.A. App. 684.

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[4] American National Standards Institute/Outdoor Power Equipment Institute, Inc.

ARGUMENT

I. Because Case failed to cross-appeal the District Court's ruling on the *Daubert* issue, this matter was not properly before the Fourth Circuit Court of Appeals.

It is an inveterate and certain rule that an appellee may not attack a decree from a lower court "with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below." *Morley Construction Company v. Maryland Casualty Company*, 300 U.S. 185, 191 (1937). Since *Morley* was decided, this Court has many times invoked this doctrine, explaining that although a prevailing party need not cross-appeal to defend a judgment on a ground rejected below, the prevailing party must file a cross-appeal if acceptance of the rejected contention would result in a modification of the judgment below. *See, e.g., Northwest Airlines v. County of Kent, Michigan*, 114 S. Ct. 844, 862 (1994); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n.14 (1985) ("An argument that would modify the judgment, however, cannot be presented unless a cross-petition has been filed"); *United States v. New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977); *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381 n.4 (1970). Case, however, did not cross-appeal the *Daubert* issue, even though the Fourth Circuit's acceptance of Case's *Daubert* argument would have logically resulted in a modification of the district court's judgment.

In the instant action, the district court denied Case's pretrial motion which argued that *Daubert* was applicable to all expert testimony, regardless of the nature of the expertise. In its post-trial motion, Case attempted the same arguments which were again rejected by the district court, but the district court granted Case's motion for judgment as a matter of law with respect to liability and certain affirmative defenses. Freeman appealed the district court's judgment as a matter of law. Because the district court ruled in favor of Freeman on the *Daubert* issue, Freeman did not raise the issue in his appeal. Without filing a cross-appeal, Case nevertheless argued that the district court's judgment was due to be affirmed in part because Reed's testimony was inadmissible under the criteria set out in *Daubert*.

In reply, Freeman argued, *inter alia*, that Case had not filed a cross-appeal and, therefore, Case could not attack the district court's ruling on this issue. Case sought to greatly enlarge its rights by substantially altering the district court's ruling.[5] Therefore, Case violated the inveterate and certain rule of *Morley*, and the Fourth Circuit was without jurisdiction to consider Case's *Daubert* argument.[6]

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[5] As discussed later in this brief, Reed's opinions would "pass muster" in any circuit.

[6] A number of courts have held that the cross-appeal requirement is one governing the power or jurisdiction of the appellate court, while other courts have treated the cross-appeal requirement as a rule of practice. *See Marts v. Hines*, 117 F.3d 1504, 1507-1508 (5th Cir. 1997) (dissenting opinion) (providing comprehensive review of circuit decisions). But even in those courts adopting the less concrete "rule of practice

Case now petitions for certiorari on an issue over which the Fourth Circuit did not have jurisdiction and which was not addressed in the body of the Fourth Circuit's opinion. Because this action is plagued by jurisdictional irregularities, it is not an appropriate means for addressing *Daubert*.

II. Because the Fourth Circuit Court of Appeals did not address the *Daubert* issue, the Fourth Circuit's judgment is an inappropriate vehicle for reviewing *Daubert*.

The issues presented by Case to this Court were never decided by the United States Fourth Circuit Court of Appeals, perhaps in part because Case failed to cross-appeal the district court's ruling on *Daubert*.

Respondent submits that not only would it be imprudent to grant certiorari in this matter because the Fourth Circuit did not have jurisdiction over this issue, but also because the Fourth Circuit simply did not address this issue.

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interpretation," the rule may only be waived in certain narrow circumstances. *Id.* "Where 'rule of practice' waiver of failure to appeal has been invoked it has almost always been in highly unusual cases involving three or more parties where the rights of the parties are interdependent and on the appeal by one party the appellate court changes the judgment in a way that adversely affects the rights of one non-appealing party as against another or eliminates the basis of the judgment against a non-appealing party." *Id.* at 1518-1519. Certainly, such circumstances did not exist when Case pursued its *Daubert* argument before the Fourth Circuit.

Case bases its entire petition for certiorari on a six-sentence footnote by the appellate court in its order reversing the trial court and reinstating the jury's verdict. Noting that Case appears to misunderstand the *Daubert* test, the Fourth Circuit specifically stated that it would not address Case's argument that *Daubert* should be applied to technical (or applied scientific) testimony. Accordingly, Case's alarmist assertion that the footnote, which specifically declined to even address the issue, represents the wholesale "adoption" by the Fourth Circuit of an approach which threatens the very existence of Rule of Evidence 702 is a gross mischaracterization of the Fourth Circuit's opinion and footnote. Respondent submits that because this issue was specifically not addressed by the Fourth Circuit, this case is not a "prototypical" one, and it would be improvident to rely on it in order to resolve any perceived circuit divisions.

This Court's traditional rule precludes a grant of certiorari when "the question presented was not pressed or passed below." *U.S. v. Williams*, 504 U.S. 36, 40 (1992); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them"). Although this is a disjunctive test, *see Williams*, 504 U.S. at 40, this Court generally will not address arguments that were not the basis for the decision below. *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, 880 n.5 (1996). In fact, as a prudential concern, this Court has often times refused to address an issue that has not been passed upon below. *See e.g., Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970); *Federal Trade Commission v. Anheuser-Busch, Inc.*, 363 U.S. 536, 542 (1960)

(holding "it would be unwise for [the Court] to grapple with these intricate problems, the solution to which requires a careful examination of a voluminous record, before they have been dealt with by the Court of Appeals"); *Aetna Casualty & Surety Co. v. Flowers*, 330 U.S. 464, 468 (1947); *cf. City of Springfield v. Kibbe*, 480 U.S. 257, 259-60 (1987) (dismissing writ of certiorari as improvidently granted in part because Court of Appeals had not considered issue); *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 226, n.2 (1975) (noting that "[i]n the absence of decisions on these questions by the courts below, we decline to address them"); *Morley*, 300 U.S. at 191.

Case declares that "this case offers an ideal opportunity for further development of this important area of the law." Pet.'s Br. at 7 (internal citations omitted). Despite Case's declaration, however, the Fourth Circuit did not address this area of the law, merely acknowledging Case's argument in a footnote and determining that it was insufficient to serve as a basis for affirming the trial court's decision to grant judgment as a matter of law. Simply put, neither this six-sentence footnote nor *this case* can be considered a "holding," signaling a new approach or directive by the Fourth Circuit on *Daubert*. Rather, the only significance that should be attached to the appellate court's footnote is that the issue, at least in the context of this case, was so insignificant as to only warrant a footnote on the subject. This case has not been "passed on" below, and there is no appellate judgment for the Court to review. Accordingly, this case cannot be deemed an adequate opportunity for further development of *Daubert*.

III. The admission of Reed's testimony would survive appellate scrutiny even in those circuits Case claims correctly apply *Daubert*; therefore, this case does not involve expert testimony which would be treated differently among the circuits.

Certiorari should be denied because Reed was properly qualified as an expert witness under Rule 702 and would be allowed to testify even under the decisions Case views as correct statements of the law. Certiorari on this issue should be reserved for the case which presents expert testimony which conceivably would result in inconsistent rulings among the circuits.

Reed was uniquely qualified, especially when compared to Case's experts, to testify about the design of the 1130 because of his experience with similar products. Pet. App. at 9a. Reed had previously worked as a design engineer for Toro Inc., a company that manufactured mowers and tractors. C.A. App. 647. During his final three years with Toro, Reed held the position of chief product engineer. C.A. App. 647. As part of his duties while employed by this manufacturer, Reed was actively involved in the investigation of accidents involving mowers and tractors which were designed or manufactured under his direction. C.A. App. 651. When given the opportunity at trial to voir dire Reed on his qualifications as an expert, Case declined and allowed Reed to proceed with his expertise and knowledge unchallenged. C.A. App. 656. Reed provided the jury with uncontested "first hand familiarity" with issues involved in this case. Therefore, Reed was properly "qualified as an expert by knowledge, skill, experience, training [and] education" and could offer his opinions regarding the design of the 1130

under Rule 702. *Surace v. Caterpillar*, 111 F.3d 1039, 1055 (3rd Cir. 1997) (recognizing that while there was no "litmus test" to qualify as an expert, to be admissible, the witness must possess sufficient knowledge of the subject matter either through skill, experience, training, or education).

Having been properly qualified, Reed then provided the jury with sound opinions supported by the facts. Case's broad charge that "Reed did not testify that Case had failed to comply with any government, industry, or other safety standard applicable to the Case 1130" is not true. Pet.'s Br. at 4. Reed testified that Case violated two industry standards when it elected not to include an OPC device on the 1130. C.A. App. 684, 685, 725, 752.

Reed's testimony regarding the OPC easily satisfies the scrutiny found in those cases "applying" *Daubert* to engineering testimony about the efficacy of designs. For example, in *Peitzmeir v. Hennessy Industries, Inc.*, 97 F.3d 293 (8th Cir. 1996), the court affirmed the exclusion of the expert's opinion because the expert had never designed nor built the proposed safety devices and therefore had no factual basis to support feasibility. *Id.* at 298. At trial, Case stipulated to the feasibility of incorporating an OPC into the design of the 1130. C.A. App. 692. Case's stipulation demonstrates the fallacy of applying *Daubert* in design engineering "where general acceptance is the norm, not the exception." *Officer v. Teledyne Republic/Sprague*, 870 F.Supp. 408, 410 (D.Mass. 1994). Since Case stipulated to feasibility, Reed's testimony is admissible even under the circuits rigidly applying *Daubert*.

With respect to the pedal design, Reed personally tested Freeman's 1130 and found that when co-engagement occurred, the brakes would not override the forward movement of the 1130 thereby producing an unreasonably dangerous lunging motion. Although Freeman's 1130 was made available to Case, it did not conduct any similar tests on Freeman's 1130 even when given the opportunity at trial. As was the case with Reed's testimony on the OPC, Reed's testimony on the pedal design is admissible even under the cases ostensibly applying *Daubert*. *Dancy v. Hyster Co.*, 1997 WL 590122 (8th Cir. Sept. 25, 1997) (expert testimony was excluded because the product could have been tested but was not); *Deimer v. Cincinnati Sub-Zero Products, Inc.*, 58 F.3d 341, 344 (7th Cir. 1995) (expert's opinion not admissible because the expert failed to conduct any studies or analysis to substantiate its opinion). Unlike the expert in *Deimer*, Reed did conduct tests on the product which verified his opinions. While Case may attack Reed's testing, such an attack must be done through "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof." *Daubert*, 509 U.S. at 596.

Reed was properly qualified under Rule 702 to give testimony on the product involved in this litigation. Reed's opinions were supported by testing which satisfied even the most stringent applications of *Daubert* outside its intended scope. Because Reed's testimony would survive appellate scrutiny in any circuit, this case does not give this Court the circumstance to address the perceived "split" among the circuits.

Case purveys the very problem that it claims it seeks to remedy. That is, Case provided the jury with nothing more than "self-authenticat[ed] testimony from paid experts." Freeman, on the other hand, provided the jury with testimony from an engineer who not only tested the product but had years of design experience with similar products. Even assuming that there is a problem with self-authenticating experts escaping scrutiny, Smith Reed's testimony does not fall into this category.

IV. The split among the circuits on this issue reflects the flexible guidelines suggested by this Court.

A. Expert witnesses are not given a "free pass" in the Fourth Circuit.

Case erroneously equates the Fourth Circuit's refusal to apply the same scrutiny that is required for admission of novel scientific testimony to every conceivable expert opinion to a wholesale abandonment of the court's duty to screen expert testimony under Rules 702 and 703. While circuits employ the flexible rules of *Daubert* in slightly different ways, the result is largely the same: an assurance of a requisite degree of reliability. *Daubert*, 509 U.S. at 594 ("The inquiry envisioned by Rule 702 is, we emphasize, a flexible one.").

Case alarmingly claims that experts receive a "free pass" to testify in the Fourth Circuit although it does not provide any examples of such cases nor does it engage in any analysis of Fourth Circuit decisions regarding expert

testimony.[7] A review of the Fourth Circuit's decisions demonstrates that Case's claim is a gross exaggeration and that the Fourth Circuit correctly applies the requirements of the Federal Rules of Evidence when reviewing the admission of expert testimony.

* *Brown v. Auto-Owners Insurance Company*, 121 F.3d 697, 1997 WL 547975 (4th Cir. 1997) (unpublished decision). The Fourth Circuit affirmed the district court's exclusion of the plaintiff's expert. Although the expert was a professional engineer, the district court found that the expert's opinion was based on nothing more than subjective belief and unsupported speculation.

* *Redman v. John D. Brush and Company, et al.*, 111 F.3d 1174 (4th Cir. 1997). The Fourth Circuit reversed the district court's decision to permit an expert to testify regarding the standards related to the design and manufacture of safes because the expert lacked the requisite knowledge required under the Federal Rules of Evidence. According to the Fourth Circuit,

> [i]n the absence of an industry standard for burglar deterrence, it would be speculative and misleading for the expert to opine that the safe did not meet that undefined standard. *Cf. Alevromagiros*, 993 F.2d at 421 (rejecting expert testimony that amounts to mere "subjective opinion" because "[l]ike the Fifth Circuit, we are unprepared to agree that 'it is so if an expert says it is so.' " [citation omitted]).

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[7] Case's alarm must be viewed with skepticism given the lack of qualifications of its own expert to testify about the product at issue in this litigation.

* *Gowey v. United States, et al.*, 106 F.3d 390, 1997 WL 35348 (4th Cir. 1997) (unpublished decision). The Fourth Circuit affirmed the district court's exclusion of all the plaintiff's expert witnesses because the experts' opinions lacked reliability.

* *Cavallo v. Star Enterprises*, 100 F.3d 1150 (4th Cir. 1996). The Fourth Circuit affirmed the district court's stringent interpretation of *Daubert* which excluded two toxicologists' testimony linking the plaintiff's chronic illnesses to her exposure to vapors from a petroleum spill.

* *United States v. Dorsey*, 45 F.3d 809 (4th Cir. 1995). The Fourth Circuit affirmed the exclusion of two forensic anthropologists under *Daubert* and the Federal Rules of Evidence.

* *Alevromagiros v. Hechinger*, 993 F.2d 417 (4th Cir. 1993). The Fourth Circuit rejected the expert's subjective opinion in a products liability case and affirmed the district court's judgment as a matter of law for the defendant.

As demonstrated by the cases set forth above, the Fourth Circuit like all other circuits requires experts to satisfy standards set out by the Federal Rules of Evidence which insure the requisite degree of reliability. A comparison of the Fourth Circuit cases addressing expert testimony with those circuits Case touts as correctly applying *Daubert* reflects a remarkable degree of similarity. For example, the Third Circuit in *Surace* excluded the testimony of an engineer who had extensive experience in mechanical and electrical engineering but had little or no

experience with "habituation."[8] *Surace*, 111 F.3d at 1055. Because habituation was central to the expert's opinions, the Third Circuit affirmed the district court's exclusion of the expert's testimony. *Id.* The Third Circuit's analysis in *Surace* is almost identical to that of the Fourth Circuit's in *Redman*.

B. There is no significant split among the circuits.

The "split" among the circuits is more one of semantics than substance. Even those circuits "applying" *Daubert* across the board do so with a great deal of flexibility when confronted with novel scientific testimony. That is, even those circuits applying *Daubert* across the board acknowledge that not all the *Daubert* factors are relevant to technical or other specialized knowledge and their analysis usually concerns traditional notions of reliability. In this respect, the circuits are quite uniform and all fall within the flexible framework envisioned by Rule 702 as demonstrated below.

* First Circuit. *Bogosian v. Mercedes Benz of North America, Inc.*, 104 F.3d 472 (1st Cir. 1997). The language of this decision does not support Case's assertion that the First Circuit would apply the same analysis used for the admission of novel scientific testimony to other types of expertise. This is illustrated by the First Circuit's statements that "even if *Daubert's* specific discussion of the admissibility of scientific principles did not strictly apply

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[8] Habituation is a phenomenon by which a person becomes immune to a particular stimulus through repeated and constant exposure.

to [technical expertise], the admissibility was still controlled by the requirement of factual relevance and foundational reliability" and that the "district court unartfully cited *Daubert* in making its ruling." *Id.* at 479. The First Circuit like the Fourth Circuit requires expert testimony to be factually relevant and reliable to be admissible.

* Second Circuit. *Iacobelli Construction, Inc. v. County of Monroe,* 32 F.3d 19 (2nd Cir. 1994). The Second Circuit found that the *Daubert* standards for evaluating novel scientific testimony did not apply to generally accepted principles; however, the court stressed that expert opinions must have a reliable factual basis.

* Third Circuit. *Surace,* 111 F.3d 1039. In *Surace, supra,* the Third Circuit did not endorse applying the "*Daubert* framework" to technical expertise as Case claims in its petition. Rather, the Third Circuit followed the requirements of Rule 702 and suggested that admissibility was determined by an expert's qualifications and experience with the subject matter of the proposed testimony.

* Fifth Circuit. *Watkins v. Telsmith,* 121 F.3d 984 (5th Cir. 1997). Although the Fifth Circuit held that *Daubert* applied to technical as well as scientific testimony, it recognized that "not every guidepost outlined in *Daubert* will necessarily apply to expert testimony based upon engineering principles and practical experience. . . . " *Id.* at 990. In such cases, the Fifth Circuit suggested that physical testing will often satisfy the standard of evidentiary reliability. In *Watkins,* the expert had failed to test his alternative designs and did not even make any drawings or perform calculations which would have substantiated his opinions. The Fifth Circuit stressed the

importance of testing, especially in those cases where the expert proposes an alternative design.

* Sixth Circuit. *Smelser v. Norfolk Southern Railway Company*, 105 F.3d 299, 304 (6th Cir. 1997). In this case involving an allegedly defective shoulder belt, the Sixth Circuit found that a biomechanical engineer's testimony was not admissible. The Sixth Circuit stressed the importance of testing and found that the expert had failed to perform any tests of the lap belt yet concluded it was in proper working condition.

* Seventh Circuit. *Cummins v. Lyle Industries*, 93 F.3d 362 (7th Cir. 1996). The Seventh Circuit recognized that "in some 'as applied' situations, some of the non-exhaustive factors noted by the Supreme Court in *Daubert* are worthy of less emphasis than in situations involving more abstract or novel scientific theory." *Cummins*, 93 F.3d at 367, n.2. In *Cummins*, the Seventh Circuit, operating under the manifestly erroneous standard, found that the district court did not err in excluding the testimony of the plaintiff's expert. The Seventh Circuit's opinion emphasized the importance of "hands-on" testing. *Id.* at 369.

* Eighth Circuit. *Peitzmeier*, 97 F.3d at 299; *Pestel v. Vermeer Manufacturing Company*, 64 F.3d 382, 384 (8th Cir. 1995). Similar to other circuits, the Eighth Circuit emphasized the role of testing. The Eighth Circuit also rejected the type of litmus test urged by Case stating that "[peer review] is not required for admissibility" and the court's recognition that such *Daubert* factors such as the "potential rate of error" is not always relevant.

* Ninth Circuit. *McKendall v. Crown Control Corporation*, 122 F.3d 803 (9th Cir. 1997). The Ninth Circuit found that

the *Daubert* framework was not applicable to expert testimony based upon engineering experience developed from the investigation of hundreds of accidents. Citing one of its earlier *Daubert* decisions, the Ninth Circuit stated that

> . . . *Daubert* only applies to the admissibility of 'scientific' testimony, is correct, at least in a narrow sense, as to *Daubert*'s applicability. However, if one views *Daubert* in a broader context, the *Daubert* Court is giving strong advice to district courts: in ruling on the admissibility, trial judges are the gatekeepers and should pay particular attention to the reliability of the expert and his or her testimony. *See Daubert*, 509 U.S. at 590. In that sense, *Daubert* applies to all expert testimony.

McKendall, at 806-807, n.1.

* Tenth Circuit. *Compton v. Subaru of America, Inc.*, 82 F.3d 1513 (10th Cir. 1996). The Tenth Circuit held that the *Daubert* factors have little relevance when the expertise is based upon experience or training. In such cases, the trial court must make a "preliminary finding that the proffered expert testimony is both relevant and reliable while taking into account '[t]he inquiry envisioned by Rule 702 is . . . a flexible one.' " *Id.* at 1519 (citing *Daubert*, 509 U.S. at 589-95).

* Eleventh Circuit. *United States v. Lee*, 25 F.3d 997 (11th Cir. 1994). The Eleventh Circuit never ruled on the issue raised in the petition. In this case, the Eleventh Circuit held that the data from scientific instruments was not exempt from *Daubert*.

Even those circuits, that is, the Fifth, Seventh, and Eighth, which specifically held that *Daubert* is not limited solely to novel scientific testimony, apply the *Daubert* factors only sparingly when confronted with technical expertise. Their approach in determining the admissibility of expertise in this area closely resembles the approach of those circuits refusing to apply the *Daubert* standards to non-scientific testimony. Both approaches stay within the flexible guidelines of Rule 702 to insure reliability, which is the touchstone of expert admissibility.

V. When confronted with expert testimony, the circuits correctly focus their inquiry into the methodology as opposed to the ultimate conclusions.

Case has failed to demonstrate that a conflict exists on this issue. The decisions described by Case follow this Court's directive that the "focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. at 595.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully Submitted,

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